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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1048

TOMMY LOVE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari To The Tennessee Court of Criminal Appeals

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Three questions are presented. These are stated in the Petition at page two. For the reasons given *infra*, the respondent opposes the granting of certiorari.

ARGUMENT

1. Petitioner's constitutional rights to a fair jury trial were not violated by purported remarks made by the mother of the injured party, allegedly within hearing distance of the jury, during the course of the trial.

The opinion of the Tennessee Court of Criminal Appeals disposes of this contention. Judge O'Brien, writing for the Court, says:

> "In regard to the second assignment, the record shows that during the course of the direct examination of defendant, Love, defense counsel expressed an objection to the Court about comments made by the mother of Eddie Cole within the hearing of the jury. There is no record of what she said, whether or not the jury heard any of her remarks, or anything else to indicate the remarks were prejudicial to the defendants. She was admonished by the Court about talking in the courtroom and apparently no further comments were made by her. No motion for mistrial was made at that time, and apparently counsel was aware of the woman's presence in the courtroom early in the trial when she was pointed out to him on his cross-examination of the prosecuting witness. We do not find any error on the part of the trial court or any prejudice to the defendants shown and the assignment is overruled."
>
> (Pet. App., at 16)

2. The crime of aiding and abetting an assault with attempt to commit voluntary manslaughter has been defined by the Tennessee courts. No federal constitutional question is present in a matter of pure substantive State law.

As petitioner admits in his brief, when the facts are considered in the light most favorable to the State, the petitioner told a co-defendant to shoot the victim. This was an altercation between three parties. The petitioner admittedly gave verbal encouragement to his co-defendant to commit the crime. The State's proof showed petitioner kicked the victim in the face after he was shot, all the while shouting obscenities to him and commanding him to die.

3. The trial judge did not unduly coerce the jury.

The supplemental instruction objected to is here reproduced as follows:

> THE COURT: Very well, the jury will retire with the charge of the Court and the indictment and follow the instructions of the Court.
> THEREUPON, THE JURY RETIRED TO CONSIDER ITS VERDICT AND RETURNED TO THE COURTROOM WHERE UPON THE CALL OF THE JURY WAS WAIVED BY COUNSEL FOR RESPECTIVE PARTIES. THE JURY BEING UNABLE TO REACH A VERDICT, THE COURT FURTHER CHARGED THE JURY AS FOLLOWS:
> THE COURT: Gentlemen of the Jury, I further charge you: You are here to arrive at a verdict, not a mistrial.
> While the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of your fellows, yet you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide the case if you can conscientiously do so. You should listen with a disposition to be convinced to each other's

arguments. If the larger number are for conviction or acquittal, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many other men, equally honest, and equally intelligent with himself.

The jury should not go contrary to their convictions, but they should properly give heed to the opinions of their fellow jurors and by reasonable concessions reach a conclusion which although not originally entertained by any of them, nevertheless, may be one to which all can scrupulously adhere.

In other words, the minority should listen to the views of the majority with the disposition of being convinced.

/s/ Richard R. Ford
JUDGE

THEREUPON, THE JURY AGAIN RETIRED TO CONSIDER ITS VERDICT AND RETURNED TO THE COURTROOM AND REPORTED AS FOLLOWS:

THE COURT: Gentlemen of the jury, have you reached a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: And what is the verdict of the jury?

THE FOREMAN: We find the defendants, Tommy Love and James Russell, guilty of assault with intent to commit voluntary manslaughter and fix the sentence at three years in the penitentiary.

THE COURT: If that is the verdict of each member of the jury, so indicate by each of you raising your right hand, please. (The jury so indicates.) Let the record show that each member of the jury states that it is his verdict in this case.

THEREUPON, THE MOTION WAS MADE FOR A NEW TRIAL, AND THE COURT ALLOWED THE DEFENDANT

TEN (10) DAYS IN WHICH TO FILE MOTION FOR A NEW TRIAL. THE JURY WAS DISMISSED AND COURT ADJOURNED.

It was noted in ***Shaw v. Robbins***, 338 F.Supp. 756, 758-759 (D. Maine 1972) that although the "Allen" charge had been subject to much criticism, in matters of federal habeas corpus no court had yet held the charge to be intrinsically so coercive as to amount to a denial of Due Process.* ***Johnson v. Louisiana***, 406 U.S. 356 (1972) (approving 9 to 3 verdicts) and ***Apodaca v. Oregon***, 406 U.S. 404 (1972) (approving 10 to 2 verdicts) have foreclosed any argument about the "Allen" charge in a State trial.

Federal appellate courts in the exercise of their supervisory powers have approved charges similar to the charge in the present case. Mr. Chief Justice Burger, writing for the District of Columbia Circuit in ***Fullwood v. United States***, 369 F.2d 960, 962-963, ***cert. denied***, 387 U.S. 934 (1967) said:

> "At one point, the trial judge said that a juror should 'distrust' his judgment if he finds the large majority takes a different view. This may be viewed as slightly stronger than the phraseology of 'Allen' ('consider whether his doubt was a reasonable one') but it is not enough of a difference to require reversal, especially since it was followed by a precise repetition of the 'Allen' phraseology.

---

* The United States Court of Appeals for the Sixth Circuit in Jones v. Norvell, No. 72-1469, decided January 5, 1973, has held a State court version of the "Allen" charge in violation of the Fourteenth Amendment. Tennessee intends to seek certiorari in this case.

"A second variation occurred when the judge instructed that 'if much the larger number of jurors are for acquittal' or 'if the majority of the jurors are for conviction', the minority in each situation should re-examine its position. While this was a transposing of the terms used by 'Allen', which referred to a majority of those voting for acquittal and much the larger number being in favor of conviction, we do not see in it a coercive thrust."

See also, *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972), *rehearing en banc pending* (upholding "Allen" charge with similar language); and *United States v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969), *cert. denied*, 396 U.S. 837 (holding that "Allen" charge, with a direction that a juror should distrust his own judgment if he finds a large majority taking a different view is an unwarranted judicial invasion of the exclusive province of the jury. The Court of Appeals affirmed, however, admonishing the lower federal courts that in the future this will be reversible error.)

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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